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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5344

JAMES RAYMOND MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Whether it is improper to give the presumption of correctness to the state courts' finding that Moore was not deprived of the right to counsel, where Petitioner has argued and the Respondent has conceded that Moore was in fact deprived of this federal Constitutional right.

II. Whether the lower courts in this case have failed to apply the prevailing federal Constitutional standards to the facts regarding Petitioner's initial counsel-less confrontation with the sole eyewitness and the prejudice resulting therefrom.

III. Whether the totality of circumstances in this case demonstrate a substantial likelihood of irreparable misidentification, because the sole eyewitness had only ten to fifteen seconds to view her assailant, in a unlit room, when her attention was divided between the assailant's face and the weapon he carried, which viewing resulted in a vague initial description given immediately after the crime.

IV. Whether it was prejudicial error to deny Petitioner's appointed attorney access to the transcripts of the proceedings at which Petitioner was deprived of his Sixth Amendment right to counsel and his Fourteenth Amendment right to fair identification procedures, where this denial precluded the possibility of curing the earlier defects.

ARGUMENT

I.

THE RESPONDENT HAS PROPERLY CONCEDED THAT MOORE'S FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL HAS BEEN VIOLATED; SINCE THE LOWER COURTS FAILED TO FIND THIS VIOLATION, IT IS IMPROPER TO PRESUME THE CORRECTNESS OF THE STATE COURTS' FINDINGS OF FACT AND LAW.

In the opening paragraph of its brief, the Respondent conceded Petitioner's principal argument, namely that James R. Moore was denied his Constitutional right to have counsel present at his initial confrontation with the sole eyewitness against him. But in Petitioner's view, the Respondent has nevertheless mis-stated the applicable law which is involved here, and has obscured and/or omitted many of the facts to which the law must be applied. Thus, this Reply Brief will recall for the Court the actual legal questions which have been raised and which remain vital for consideration.

By conceding the validity of Petitioner's argument that Moore did have the right to counsel at his first preliminary hearing, where he was first confronted by the complainant Marilyn Miller, the Respondent apparently hoped to divert attention from this central issue, and by saying that it had already been decided below, salvage the decision of the Court of Appeals. However, such a result is impossible, since *no* court in the history of this case has ever held that Moore had the right to have counsel present at that hearing. In point of fact, the District Judge held that it was

unnecessary for him to pass on the issue because he had based his decision on other grounds; and the Court of Appeals held — incorrectly — that this Court's opinion in *Kirby v. Illinois*, 406 U.S. 682 (1972) precluded the attachment of the right to counsel for Moore, who had not been indicted. (See Brief for the Petitioner, pp. 14-16). Thus, if only on procedural grounds, the Respondent is patently wrong in its assertion that the right to counsel issue in this case is not viable because "each of the four state and federal courts that have considered this case" has held that there "may have been" a violation of the right to counsel.¹

Notwithstanding the Respondent's inaccurate reading of the opinions in the lower courts, the right to counsel in criminal proceedings is not the type of issue which can be dismissed lightly under any circumstances. As this Court has recently reaffirmed: "This right, guaranteed by the Sixth and Fourteenth Amendments, is

¹ As for the State courts, the record is not nearly so clear as Respondent avers. The trial judge began his ruling with a statement which revealed his own misconceptions as to the holding and meaning of *United States v. Wade*, 388 U.S. 218 (1967) at Tr. 133, and completed the finding without even once referring to the fact that *Wade* and *Gilbert v. California*, 388 U.S. 263 (1967) guaranteed the right to have counsel present at eyewitness confrontations. (Tr. 134-136).

On appeal, the Illinois Supreme Court rendered an opinion which never even cited the controlling cases of *Wade*, *Gilbert* and *Stovall v. Denno*, 388 U.S. 293 (1967). Thus, it, too, failed to reach the basic issue of Moore's right to counsel.

The State courts purportedly based their decisions on a finding that the confrontation itself was not "suggestive" and yet the two federal courts both found that this "showup" was in fact suggestive. Thus, State findings of law in this case and in all *habeas corpus* cases are far from inviolate.

indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, ____ U.S. ____, 45 L.W. 4287, 4290 (1977). In *Williams, supra*, this Court emphasized once again that the right to have counsel present at critical pre-trial stages is a "vital need" of all defendants who have been formally charged by the State. *Id.* In light of the facts of the case at bar, and this Court's long-standing commitment to the provision of counsel at all adversary stages of the prosecution as expressed again in *Williams, supra*, the Respondent's attempt to remove this central issue from consideration is totally unacceptable.

It appears to bear repeating that this case arose some six months after all states had been put on notice that counsel-less confrontations with eyewitnesses are not Constitutional. Among the reasons for the Court's rulings in *United States v. Wade*, 388 U.S. 218 (1967) was the crucial point that counsel, and only counsel, can protect against unfairness in the confrontation procedure itself, and if any irregularities do occur, the attorney can attack them later. As the Court pointed out, for many defendants, the adjudication of the identification issue ends at this early stage. (See Brief for the Petitioner, p. 27). Thus *Wade*, while first and foremost providing for the protection of the accused's Sixth Amendment rights to counsel and cross-examination, was also designed to preserve the accused's rights to fair procedures, as guaranteed by the Fourteenth Amendment. *Id.* at 226. It would be difficult to imagine a factual situation which illustrates more completely the seriousness of the two dangers which the *Wade* case recognized and sought to protect: Moore was made to appear in court without a lawyer present,

and to be viewed and finally identified by the sole adversarial eyewitness in his case — but only after the prosecutor had made untrue statements about the “evidence” in the case. No one but Moore’s own lawyer could have prevented the snow-balling effect of the initial denial of counsel in this case, but even he was later denied the tools with which to repair the damage once it had been done. (See Brief for the Petitioner, pp. 26-30; 46-52).

Under all the circumstances of the case before this Court, therefore, the Respondent is simply wrong in asserting that we are asking the Court merely to review the facts of this case. The exact opposite is true: the Petitioner had properly asked this Court to review the findings of the lower courts which have misapplied or ignored the Court’s rulings as to the Constitutional issues raised below; it is the Respondent who wants to dismiss the critical legal issue of the right to counsel. There has never been a dispute as to the facts of this case on *habeas corpus* review; neither party requested an evidentiary hearing in the District Court, and no hearing was conducted.² The contest has always been

²Petitioner has never questioned the reliability of the *facts* which the Illinois Supreme Court set out in its opinion. Indeed, as was pointed out in the Brief for the Petitioner, pp. 33-38, it was the federal district court which *initiated* the only factual dispute by confusing the two separate photographic viewings, and finding that the complainant selected Moore’s picture out of a group of hundreds (A. 34). The Court of Appeals and now the Respondent have perpetuated this misconception, but the Illinois Supreme Court at least was correct in finding that the complainant first saw a group of 200 pictures which did not include Moore’s picture, and then saw a second small group of pictures, one of which was Moore’s. (A. 7)

over the correct application of federal Constitutional standards to those undisputed facts. It is well-settled that this is the appropriate function of the federal court in *habeas corpus* cases:

Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court’s findings of fact, he *may not defer to its findings of law*. It is the district judge’s *duty* to apply the applicable federal law to the state court fact findings *independently*. The state conclusions of law may not be given binding weight on habeas.

Townsend v. Sain, 372 U.S. 293, 318 (1963). (Emphasis added)

Respondent’s assertions that the only issues in this case are factual ones is thus without merit. Furthermore, its reliance on the language of 28 U.S.C. sec. 2254(d) is misplaced, because that portion of the habeas corpus statute runs to purely factual issues. The case at bar does not fall within the purview of sec. 2254(d) simply because there were no factual issues before the District Judge. As this Court explained in a footnote to its landmark decision in this area:

By “issues of fact” we mean to refer to what are termed basic, primary, or historical facts: facts “in the sense of a recital of external events and the credibility of their narrators . . .” So-called mixed questions of fact and law, which require the applications of a legal standard to the historical-fact determinations, are not facts in this sense.

Townsend v. Sain, 372 U.S. 293, footnote 6, at 309-310 (1963) (Citation omitted)

In the District Court, the Court of Appeals, and in this Court, the Petitioner’s sole purpose has been to

urge a just resolution of the mixed law-and-fact issues regarding the identification of James R. Moore and by the complaining witness, which resulted in his imprisonment. The raising of these federal Constitutional issues in the federal *habeas* court was the only appropriate recourse, once the available state remedies had been exhausted. It is much too late for the Respondent to make the specious argument that the federal courts, which have had proper jurisdiction over these matters, cannot make the mixed legal and factual findings which they are required to make. This case is rightfully before this Court, which has granted *certiorari* in order to do precisely what the Respondent erroneously claims it may not do (See Brief for Respondent, p. 11), namely, review the legal determinations of the courts below.

The case of *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), is not controlling here because in that case the Court was faced with a situation in which the District Court had made its own findings of fact, having decided the state court's post-appeal hearing on this issue of the voluntariness of Delle Rose's confession had been adequate because the state court had applied the correct legal standards to the facts before it. Thus, the federal district court in the *Delle Rose* case was in a different posture from that of the District Court in the case at bar. Here, the District Judge could rely on an adequate state record for purely factual determinations, but he was still compelled to apply prevailing federal law to these facts, since the Illinois courts had not applied the correct federal standards as set out in *Wade*. (See Footnote 2, *supra*.)

Although the *Delle Rose* case placed the burden on the *habeas* petitioner to establish that the state court

determinations were erroneous, it upheld the guiding principle which this Court had earlier outlined in *Townsend v. Sain*, 372 U.S. 293, 318 (1963). Therefore, if there is any question in this case regarding the applicability of 28 U.S.C. §2254(d), it should be resolved as dictated by *Townsend*, in which the Court defined the federal courts' *obligation* to review the mixed issues of fact and to apply the *federal* law to the facts. Following this rule, it is undeniable that the Illinois courts' findings in Petitioner's case may not be relied upon because they did not even reach most of the federal Constitutional issues, and they misapplied the federal law in those few which were decided.

For all of the foregoing reasons, the Respondent's arguments regarding the issues which remain for this Court to decide must be rejected. Petitioner is entitled to have his rights under the Constitution of the United States adjudicated in this Court, at this time. We respectfully submit that the issue of Moore's right to counsel is a vital Constitutional issue and not simply a question of fact.

II.

THE LOWER COURTS IN THIS CASE HAVE FAILED TO APPLY THE PREVAILING FEDERAL CONSTITUTIONAL STANDARDS TO THE FACTS REGARDING PETITIONER'S INITIAL COUNSEL-LESS CONFRONTATION WITH THE SOLE EYEWITNESS AND THE PREJUDICE RESULTING THEREFROM.

In conceding that James R. Moore was entitled, as a matter of federal Constitutional law, to the presence of

a lawyer at his initial confrontation with the complainant Marilyn Miller, and that as a matter of fact he was deprived of such right to counsel, the Respondent argues that one issue remains in this portion of the case, that of the "independent basis" for Miller's "in-court" identifications. While the Petitioner submits that our argument on this point is adequately presented in the main brief at pp. 26-39, it is necessary to clear up a number of misapprehensions and to correct certain factual errors contained in the Respondent's brief.

The basic flaw in the Respondent's first argument is its continuing insistence that the Constitutional rights delineated by this Court in *United States v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967) are not legal issues but merely factual matters. This initial misconception further reveals a misunderstanding of the principles so plainly and carefully enunciated in those leading cases, and therefore, of the purpose and function of the exclusionary remedy fashioned by this Court. That is, *Wade* and *Gilbert* held that the denial of counsel at a pretrial confrontation required *per se* the exclusion of all testimony which is derived from such an illegal procedure. This means that without any further evidence from the State, testimony regarding the confrontation itself will automatically be excluded at trial. *United States v. Wade*, 388 U.S. 218, 240 (1967).

Since, contrary to Respondent's contention on p. 9 of its brief, Marilyn Miller testified fully as to the December 21, 1967 confrontation, at a bare minimum, all of that testimony should have been excluded. To wit, all of the direct examination testimony which was

brought out by the State (Tr. 232-234), and all of the testimony on cross-examination (Tr. 279-288) should never have been allowed to go before the jury. Because of the violation of Moore's right to counsel, all of that testimony was inadmissible, and yet it was all used against him in the course of the trial. The Respondent's statement that no such testimony existed is therefore factually incorrect.

Respondent goes on in the same paragraph to say that "Evidence of the confrontation was not later used to buttress" the subsequent in-court identifications. This statement is of course a legal conclusion, and not a mere statement of fact. But it, too, is contradicted by the Record in the case. The prosecution's elicitation of the witness' testimony clearly was designed to buttress the later identification which flowed from it. The test established by this Court for the admissibility of in-court identifications, where the Sixth Amendment right to counsel has been violated, shifts the burden of proof from the accused to the State which must then show "by clear and convincing evidence" that the identifications had an origin independent of the illegal confrontation. Here, since the initial deprivation of Petitioner's right to counsel was immediately followed by a highly suggestive "show-up," the State cannot fulfill *Wade's* requirement with the bare statement that the "show-up" did not "buttress" the subsequent identifications.

Even though this Court has recently re-examined the applicability of an exclusionary remedy for identification procedures which are unnecessarily suggestive, it has not departed from the *Wade - Gilbert - Stovall* approach to cases involving the right to counsel. In

Manson v. Brathwaite, ____ U.S. ____, 46 L.W. 81 (1977), decided June 16, 1977, the Court held that "reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post- *Stovall* confrontations." 46 L.W. 81, 85. But this holding applies only to the Due Process consideration presented by suggestive confrontations, and not to the more basic question of the right to counsel, which the Court reaffirms as going "to the very heart — the "integrity" — of the adversary process." 46 L.W. 81, 85, fn. 14.

In Petitioner's case, the original violation was the denial of counsel, to which the *Wade* exclusionary rule must apply. The resulting suggestive confrontation only serves to emphasize the fundamental need for counsel at that point, especially since the initial identification could not have been reliable. (See Argument III, *Infra*.)

Because of the contemporaneity of the initial illegality of its "fruit" (the suggestive procedure), it is unrealistic to argue, as the Respondent has, that this Court should accept as binding the ruling of the Cook County judge who did not even articulate the *Wade* rule.

Moreover, it does not help the Respondent's position in this case, on *habeas corpus* review, to rely on the Illinois Supreme Court's determination that there was "sufficient basis" for the in-court identification, since that court clearly stated that the show-up "confirmed" the "photographic identification" (See Brief for Respondent, p. 10). It could not be more apparent that the Illinois courts in this case were not following this Court's reasoning in *Wade*, *Gilbert* and *Stovall*, since a finding of independent origin is wholly inconsistent

with a finding that *confirmation* or reinforcement is a legitimate consequence of a counsel-less confrontation. The very ingenuousness of the Illinois court's fact-finding of "confirmation" in a suggestiveness case reveals that the court was applying a totally improper standard. Hence, once again, the Petitioner challenges the State court's erroneous conclusion of *law*, rather than its findings of *fact*.³

Finally, with respect to the ultimate issue of whether the original opportunity of Marilyn Miller to view her assailant at the time of the crime provided an adequate "independent basis," it is important to note two things. The first is that, contrary to the implications on p. 12 of the Respondent's brief, it is that initial viewing alone which must be examined for the presence of an independent source for the identification. *Gilbert v. California*, 388 U.S. 263, 272 (1967). For, as we have argued in the Petitioner's brief at pp. 33-46, elements of suggestivity began to enter this case as early as the third or fourth police interview with the witness; included in this process was the second photographic viewing on which the Court of Appeals rested its finding of independent basis. It is not possible to treat this case as if there had been a number of discrete counsel-less confrontations which did not influence each other or the witness' recollections. Thus, Respondent's contention that the witness' later identifications should

³ It should be noted, however, that Petitioner does not accept the lower courts' characterization of the witness' photographic viewings as an "identification" since she failed to select any one picture the first time, and her selection of Moore's picture was only tentative the second time. (A. 63, 68).

be trusted because they appeared to be so positive is illogical.

The second point which must be made regarding the "independent basis" issue is that, although it is definitely a mixed issue of fact and law, many of the Respondent's statements on pp. 12 and 13 of its brief are not "facts." Without re-arguing the facts and their Constitutional significance, as we have presented them in the Brief for the Petitioner at pp. 33-52, we wish to point out the following: nothing in the record supports Respondent's allegation that December 14, 1967 was a "bright sunny day." (Brief for Respondent, pp. 4, 12; *compare* Appendix, p. 69.) Nor was the victim's room "well-lighted" from "multiple light sources." (Brief for Respondent, pp. 4, 12; *compare* Appendix, pp. 60, 69.) At no point in her testimony did Marilyn Miller ever say that she had a "good look" at her assailant. (Brief for Respondent, p. 12; *compare* Appendix, pp. 60-61.)

Furthermore, it is definitely not true that Marilyn Miller told the police, "almost immediately after the rape," that she had seen James R. Moore previously. (Brief for Respondent, p. 12). At the Motion to Suppress and at the Trial, all three police officers testified to the contrary. The witness never said this to the first officer on the scene. (A. 80) In fact, the record indicates that the State's witnesses were in disagreement as to whether Marilyn Miller mentioned the Smedley's incident to the other two officers much later that day or in subsequent interviews. (Tr. 164)

Finally, the apparently "positive" identification which Miller made in court took place some seven months after the rape and the suggestive identification procedures had occurred; by that late date, "positive-

ness" and "certainty" were inevitable. The facts going to the initial opportunity to view the assailant in this case therefore make out a very poor case for establishing "by clear and convincing evidence" that the viewing provided a strong enough basis for removing the taint of the supervening illegal confrontation.

Because the Respondent has failed to meet its burden in demonstrating that there was an adequate independent basis for any or all of the identification testimony in Petitioner's case, this Court should apply the rulings of *Wade* and *Gilbert* so as to exclude all such identification testimony entered against the Petitioner at trial.

III.

THE TOTALITY OF CIRCUMSTANCES IN THIS CASE DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION BECAUSE THE SOLE EYEWITNESS HAD ONLY TEN TO FIFTEEN SECONDS TO VIEW HER ASSAILANT, IN AN UNLIT ROOM, WHEN HER ATTENTION WAS DIVIDED BETWEEN THE ASSAILANT'S FACE AND THE WEAPON HE CARRIED, WHICH VIEWING RESULTED IN A VAGUE DESCRIPTION GIVEN IMMEDIATELY AFTER THE CRIME.

In Argument II of its brief, the Respondent attempts to show that the highly suggestive, one-on-one, counselless confrontation to which James R. Moore was subjected, did not affect the reliability of Marilyn

Miller's identification testimony. The argument alleges that there are "a number of facts indicating reliability." (Brief for Respondent, p. 14) However, many of these "facts" are not in the Record, and those which are in the Record plainly show *unreliability*. Since this point has been covered in the Petitioner's brief at pp. 26-45, it is only necessary to present here a review of the "totality of circumstances" as they appear from the trial testimony.

Marilyn Miller, the complainant in this case, was raped in her apartment by a large black man who carried a knife, awl or icepick, and a bandana with which he covered his face some ten to fifteen seconds after Marilyn Miller first noticed him. (A. 61, 71) The complainant had been asleep in her bedroom, with no artificial lighting, and with the windows closed. (A. 79-80) The rape occurred at about noon on December 14, 1967. (A. 50)

Meanwhile, James R. Moore, the accused, was in the cafeteria of Roosevelt University, which is at least six (6) miles from the complainant's apartment, at about noon on December 14, 1967. (Tr. 384, 473)

Marilyn Miller's first interview with the police took place a few minutes after the rape; at that time, she could recall only that the assailant had been large and black, and had worn a yellow sweater. (Tr. 324) She gave no details at all regarding his height, weight, facial features, or voice. (A. 85) It is hardly surprising that this initial description was so vague, given that her only opportunity to see the assailant had been for a few seconds, across a darkened room, when she had been awakened from a nap.

The surprising aspect of this identification problem is that Marilyn Miller's later descriptions were more detailed, and that her subsequent identifications became increasingly positive, even though the incident itself had become more and more remote. There is no legitimate reason for this to have occurred, because as a rule, memories which are unaided by suggestion or mistake do not become stronger. But it has been well-documented that once suggestion, however subtle or unintentional, is introduced, then an eyewitness becomes ever more "positive" of his/her identification. *United States v. Wade*, 388 U.S. 218, 235 (1967).

Thus it is quite evident that Marilyn Miller's delayed "recollection" of James R. Moore's face, occurring only after the police had interviewed her several times, was surely the product of some form of suggestion. No other explanation of this problem makes sense, especially in view of the Record evidence that: 1) Moore's credible alibi witnesses placed him 6 miles from the scene (Tr. 473); 2) the one fingerprint found at the scene was *not* Moore's (Tr. 356); and 3) Moore had lost the small book which Marilyn Miller found in her apartment, on the same night that they had met in Smedley's bar. (Tr. 505-506) Hence, even the State's "corroborating" evidence (the presence of Moore's book in Miller's apartment) has a reasonable explanation which casts considerable doubt on the eyewitness' reliability; she herself might have mistakenly picked up the book at Smedley's, thinking it was her own checkbook. When one looks at *all* of the circumstances regarding the identification in this case, it is impossible to accept without question the reliability of the sole eyewitness' testimony that Moore was "the man."

Finally, it must be remembered that there was no point in this case at which the eyewitness herself was not susceptible to suggestion, and that the police did introduce such elements of suggestion in the several means of identification which they employed. (See Brief for Petitioner, pp. 26-39). Under these circumstances, it was error for the Court of Appeals to find that the identification was reliable in spite of the unnecessary suggestivity of the confrontation proceeding, and its decision should be reversed.

IV.

IT WAS PREJUDICIAL ERROR TO DENY PETITIONER'S APPOINTED ATTORNEY ACCESS TO THE TRANSCRIPT OF THE PROCEEDINGS AT WHICH PETITIONER WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO FAIR IDENTIFICATION PROCEDURES, BECAUSE THIS DENIAL PRECLUDED THE POSSIBILITY OF CURING THE EARLIER DEFECTS.

It is no longer disputed that James R. Moore was deprived of his right to have counsel present at the admittedly suggestive "show-up" where he was first presented to the witness. (See Brief for Respondent, pp. 8, 14). It is also undeniable that this suggestive and counsel-less confrontation took place in court, and that the words spoken in that courtroom are a matter of public record. (A. 48) Therefore, it is manifest that possession of the transcript which contained the best

evidence of the illegalities was essential for raising a successful challenge to the procedures.

For this and all the reasons presented at pp. 46-52 of the Brief for the Petitioner, Petitioner suffered severe prejudice due to the trial judge's refusal to supply his belatedly-appointed attorney with free transcripts of the preliminary hearings. Therefore, the Court of Appeals' reliance on the Illinois Supreme Court's determination that denial of the transcripts was harmless beyond a reasonable doubt is in error.

CONCLUSION

Because James R. Moore was deprived of counsel at his first confrontation with the eyewitness, which deprivation led to an impermissibly suggestive one-on-one "showup," and appointed trial counsel was later denied the transcript of this critical proceeding, in a case where the eyewitness' testimony was the only evidence which could support a guilty verdict, it was reversible error for the Illinois trial court to admit the identification testimony which flowed from the unconstitutional confrontation. Therefore, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the dismissal of Moore's petition for writ of habeas corpus be reversed, and the writ granted.

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